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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JAMES RILEY, Defendant and Appellant.	B208302 (Los Angeles County Super. Ct. No. SA065561)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert O'Neill, Judge. Reversed and remanded with directions.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The Los Angeles County District Attorney charged appellant, James Riley ("Riley"), in a single count information with possession of cocaine in violation of Health & Safety Code section 11350, subdivision (a), a felony. Riley waived his right to a jury trial. After a bench trial the court found Riley guilty as charged and placed him on probation for a term of three years. On appeal Riley contends the trial court erred in completely denying his *Pitchess*[1] motion as to one of the two arresting officers and requests this court to independently review the sealed transcript of the *in camera* examination of the other arresting officer for error in granting only a partial disclosure of his personnel records. Alternatively, Riley contends that if no error is found pertaining to the *Pitchess* motion, error occurred when the trial court declined to order mandatory Proposition 36 treatment for Riley and to the extent his trial counsel failed to ask for such treatment his counsel rendered ineffective assistance of counsel.

For the reasons hereafter given, we reverse the judgment.

FACTUAL AND PROCEDURAL SYNOPSIS

Prosecution evidence.

On September 7, 2007, at approximately 2:20 a.m., two Culver City police officers were on patrol. The officers involved were Marcus Colen ("Colen") and Brent Arney ("Arney"). The patrol was routine and being conducted in Los Angeles County in an area north of Washington. Riley was pulled over for displaying paper license plates. Colen asked Riley for driving and registration information. In response, Riley complied by producing everything except his driver's license. The officers later found out Riley's

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

license had been suspended. In preparation for having Riley's vehicle towed, Colen searched the vehicle and found small off-white, rock-like substances resembling cocaine on the floorboard of the driver's side of the vehicle under the driver's seat where Riley had been sitting.

Prior to being arrested, Riley told Colen that he had owned the car a little over six months and was the owner and only driver of the car. Riley was issued a citation to appear on a charge of vehicle violation. No citation was issued for possession of narcotics. Riley was released at the scene at 2:00 a.m. Colen and Arney acknowledged that they returned to the scene where Riley was standing on the sidewalk. The purpose of returning was motivated by Riley's failure to sign the citation.

The substance found in Riley's vehicle had a net weight of approximately .05 grams of cocaine in base form or one-twentieth of a gram. Arney testified that this amount represented a usable amount.

Defense evidence.

Riley testified in his own defense. Riley testified that on the date of the events surrounding the traffic stop, he was heading south. Colen and another officer who Riley was not able to identify were headed north. When Riley passed the officers, they turned on their lights, made a U-turn, got behind him and pulled him over. Riley described how the officers exited their vehicle and "bum rushed" him on either side of his vehicle with their hands placed on their guns and told him to "get out of the car." Riley denied having any drugs in his car and expressed his opinion that the officers were harassing him. The accusation was denied by both officers. Riley said he just smoked "weed," but denied using cocaine. Riley further testified that his car did have paper plates both in the front and back with a sticker from the Department of Motor Vehicles because the car was unable to pass the required smog test. Riley also admitted that he did not have a driver's license.

***Pitchess* motion.**

On January 14, 2008, Riley filed his *Pitchess* motion for pretrial discovery seeking to access the personnel records of Colen and Arney for information generally described and contained in the opening paragraph of his motion as follows: "(1) All complaints from any and all sources relating to acts of aggressive behavior, violence, excessive force, or attempted violence or excessive, racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of **People v. Wheeler** (1992) 4 Cal.4th 284 against Officers **COLEN #889** and **ARNEY#1008**. Defendant specifically requests production of the names, addresses, dates of birth, and telephone numbers of all persons who filed complaints, who may be witnesses, and/or who were interviewed by investigators or other personnel from the Culver City Department, the dates and locations of the incidents complained of, as well as the date of the filing of such complaints." The motion was supported by the declaration of counsel for Riley, a memorandum of points and authorities and a proposed order for signing by the trial judge.

On January 31, 2008, the City of Culver City ("City") and the Culver City Police Department ("Department") filed opposition to Riley's motion, accompanied by a memorandum of points and authorities.

Trial court's findings and ruling on the Pitchess motion.

After hearing oral arguments the trial court found defense counsel's arguments pertaining to the need to discover the personnel records of Arney as well as a basis for bias-related materials as to both officers unpersuasive. The trial court noted in denying the motion pertaining to Arney that the defense had made no showing whatsoever for an

in camera review. However, the court granted the request regarding Colen, but limited its ruling to issues pertaining to dishonesty, perjury, planting of evidence and falsification of documents. Access was denied for any materials reflecting bias based on gender, race, sex, or use of excessive force.

After conducting an *in camera* review, the court found no discoverable evidence regarding Colen.

Judgment and sentence of the trial court.

On April 24, 2008, the trial court found Riley guilty as charged, suspended sentence, placed Riley on three years of informal probation to the court on the condition, among others, that Riley continue to receive posttraumatic stress and substance abuse counseling and treatment at the Veteran's Administration and report attendance and progress to the court.

Riley's notice of appeal.

Riley filed a timely notice of appeal on April 29, 2008, from both the sentence and judgment.

DISCUSSION

Law applicable to Pitchess motions.

We discern that there is no dispute between the parties to this litigation pertaining to the law applicable to *Pitchess* motions. Both Riley and the People give an accurate presentation of the law in their briefs on appeal. The law is well settled. It is the facts surrounding the incident in question which determine the disposition of the case as herein set forth. Be that as it may, a statement of the law is prudent at this time. This court finds the statement of law set forth in the People's "Respondent's Brief" to have utility where it is stated: "Peace officer personnel records are confidential. (Pen. Code, §§ 832.7, 832.8.) Nonetheless, criminal defendants have a limited right to gain access to such records upon a showing of good cause. (Evid. Code § 1045.) Where good cause is established, the court will conduct an in camera review of the personnel records to

determine whether they have any relevance to the issues before the court. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 80, 83; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020.) A showing of good cause for an in camera review 'requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021.) A defendant must put forward 'a plausible scenario of officer misconduct' – 'one that might or could have occurred.' (*Id*. at p. 1026.) What is key is that the defendant show a logical connection between the alleged misconduct sought to be discovered and a proposed trial defense. (*Id*. at pp. 1026-27.)

"The trial court's ruling on a motion to discover police officer personnel records is reviewed for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *California Highway Patrol v. Superior Court, supra,* 84 Cal.App.4th at p. 1019.)"

Error in denying in camera review of Arney's records.

We state Riley's contentions in capsule form as we understand them. Riley contends that his counsel's declaration, the police reports and preliminary hearing transcript of testimony were more than adequate to articulate the low threshold required for a plausible factual foundation based on the allegation that Officer Arney was "working in concert" with Officer Colen who in turn had planted the cocaine base which they claimed to have found in his vehicle.

Counsel for Riley, Eleanor Schneir, filed her "Declaration In Support Of Motion For Pretrial Discovery" under penalty of perjury with her notice of motion for discovery pursuant to *Pitchess* and *Brady*[2] on January 14, 2008. The declaration can be fairly referred to as "boilerplate" in stating generally what is discoverable under existing case law, but the declaration is specific as to the facts of this case. We repeat *verbatim* the

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2 *Brady v. Maryland* (1963) 373 U.S. 83.

relevant portion of the declaration which directly focuses on Riley by stating as follows: "Officer Colen of the Culver City Police Dept testified at the preliminary hearing (and had written in the police report) that he and his partner, Officer Arney, saw the defendant driving without a rear license plate at 0220 hours. Colen testified that when he stopped the defendant's car and spoke with the defendant he searched the vehicle and found four off-white, rock-like substances on the driver's side floorboard. The defendant was then arrested and charged with possession of cocaine and he was then cited out due to his health problems. The defendant denies possession of the items. At trial the defense will present evidence that the items were not present in the car prior to the officers contacting Mr. Riley. The evidence presented by the defense will show that Officer Colen planted the evidence, claimed to have found it in the car and then lied, both in the police report and in the courtroom, when he said that he found the items in the car. The defense will further produce evidence that the officers continued to threaten and harass Mr. Riley until he was so frightened that he called 911 to ask for help. I have received a copy of the 911 call and in it Mr. Riley tells the operator that he is afraid of the officers, that they are threatening him with arrest on bogus burglary charges and that they warned him to stay 'out of Culver City'. In the conversation with the 911 operator Mr. Riley repeatedly tells the operator that he is scared and that he wants someone to document the harassment."

The core of Riley's contention claiming abuse of discretion by the trial court in ruling that an in camera hearing was not justified to review Arney's personnel records can be summarized in a short paragraph in "Appellant's Opening Brief" as follows: "Under *Warrick, supra,* 35 Cal.4th at pp. 1024-1025, defense counsel's declaration, supported by the police reports, and preliminary hearing testimony was more than adequate to articulate the low threshold required for a plausible factual foundation based on the allegation that Officer Arney was 'working in concert' with Officer Colen who in turn had planted the cocaine base which they claimed to have found."

Riley claims the trial court acted in a peremptory manner in ruling that "no showing whatsoever" had been made for an in camera review of Arney's personnel

records. The ruling of the trial court was inferentially based on the fact that Arney was not able to be immediately identified by Riley and the fact that Arney was not directly and immediately percipient to the initial search of Riley's automobile where the cocaine was found by Colen. We find Riley's argument to be persuasive. It is clear that under the low threshold for pretrial discovery of officer personnel records, as expressed by our high court in *Warrick,* a clear case has been made for an in camera review of Arney's personnel records. Riley maintains that the cocaine was planted and that the officers lied when they claimed to have found the cocaine in his car which was there at the time they made their investigative stop and that the officers planted the evidence in an effort to justify bringing charges against him. It is not a quantum leap in reasoning to discern a logical connection between the charges and Riley's defense.

We find the trial court abused its discretion in failing to conduct an in camera review of Arney's personnel records to determine if items are contained therein which should have been revealed to the defense.

Review of the trial court's ruling following inspection of Officer Colen's personnel records.

Riley next requests this court to conduct an independent review of the reporter's transcript of the in camera hearing conducted by the trial court pertaining to the personnel records of Colen and determine whether any police documents were incorrectly withheld, citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221, as authority.

In an act of candor and forthrightness, the People do not contest, and indeed concede that this court has the authority to make the requested review. The People state their concession in the following terms in the "Respondent's Brief" on appeal: "Appellant requests that this Court review the trial court's in camera examination of Officer Colen's personnel records and its determination of relevance as to those records. . . . It is appropriate on appeal for this Court to examine the sealed record of the trial court's in camera hearing, reviewing that court's discoverability determinations for abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1232; *Pitchess v. Superior*

Court, supra, 11 Cal.3d at p. 535; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1145.) Respondent therefore does not oppose appellant's request."

In accordance with Riley's request and the People's concession, this court examined the sealed reporter's transcript of the in camera proceedings by the trial judge on February 20, 2008, pertaining to Officer Colen and find that no police personnel record documents were erroneously withheld.

Trial court's purported error in failing to order mandatory Proposition 36 treatment for Riley.

Following a bench trial, the court found Riley guilty of possession of cocaine base which was finally determined to be .05 grams. The following statement was made by the trial court at time of sentencing:

> "What we need you [defendant] to do, I'll listen to your attorney and the district attorney, have you continue at the V.A. [Veteran's Administration] and get some substance abuse treatment while you're there. I'll hear from your lawyer if you wish to postpone sentencing or if you wish me to do it today."

Defense counsel [Ms. Schneir] replied:

> "I would ask the court, while Mr. Riley is legally entitled to Prop 36, I, going to ask the court to supervise him directly on probation. Because I think the fines and fees associated with formal probation would be prohibitive. I would ask the court to put him on non-reporting probation and come back with a letter from the V.A. saying he is getting the necessary counseling."

The court then inquired if Riley was working. Riley replied "I'm a hundred percent disabled veteran. I volunteer with Corps Volunteer Center." The court then proceeded to suspend imposition of sentence and placed Riley on three-year non-reporting probation directly to the court, indicating that the court wanted a letter from Riley regarding the extent of his post-traumatic stress and an acknowledgement of his

participation in a dual-diagnostic program at the V.A. Proposition 36 treatment was not requested nor was Riley asked if he would be amenable to this procedure.

Riley contends that because there were no statutory disqualifying factors present on his record, he did not waive his presumptive eligibility for Proposition 36 treatment. Riley concludes the trial court erred by failing to give him mandatory Proposition 36 treatment, citing *People v. Esparza* (2003) 107 Cal.App.4th 691, 699 as authority.

The gravamen of the People's contention is that even though Riley qualified for Proposition 36 treatment, principles of estoppel preclude Riley from claiming the mandatory provisions of Proposition 36 and the statutory provisions passed by the legislature to carry out the passage of Proposition 36.

For the reasons hereafter stated, we agree with the People that Riley is estopped from claiming he is entitled to mandatory Proposition 36 probation.

To begin our analysis, we agree with Riley that drug treatment probation under Proposition 36 is *generally* mandatory if a defendant qualifies. Riley relies on *People v. Esparza*, *supra*, 107 Cal.App.4th at pages 694-695 as authority for this *general* principle. But, there are exceptions to this general rule.

As the People point out, it is apparent that drug treatment probation under Proposition 36 was mandatory, based on Riley's non-violent drug possession conviction pursuant to Penal Code section 1201.1, subdivision (a). But, as the People further point out, Riley was entitled to "opt out" of Proposition 36 by refusing drug treatment as a condition of probation under the authority of *People v. Espinoza* (2003) 107 Cal.App.4th 1069, 1073. The irony is that the record before the trial court reflects that Riley wished to pursue drug treatment through the Veteran's Administration. We note that such drug treatment is expressly authorized by Proposition 36, as expressed in Penal Code section 1210, subdivision (b). On the other hand, we note that the record also reflects that Riley did not believe it was in his interest to be placed on formal probation, but instead wished to be placed on summary probation which is technically a conditional sentence under Penal Code section 1203, subdivision (a) commonly referred to as non-reporting

probation. The record is clear that his counsel was in agreement with this procedure and indeed so requested as revealed in the record, cited *supra*. We further note that summary probation is less rigorous than formal probation in that it does not entail the active oversight of the probation department as would be the case in formal probation, but instead simply requires the defendant to report satisfaction of the terms of probation back to the trial court itself. However, we note that this type of probation is designed, as the People point out, for misdemeanors and infractions. Because Riley was convicted of a felony, summary probation was in fact unauthorized. (*People v. Glee* (2000) 82 Cal.App.4th 99, 104.) But the analysis of estoppel in this instance does not end here, as hereafter reasoned.

We now look to *People v. Chatmon* (2005) 129 Cal.App.4th 771 where the court observed that "[w]hen a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain." In *Chatmon* the defendant pleaded guilty to a charge of cocaine possession in exchange for the dismissal of a charge of resisting a police officer and a sentence consisting of three years of probation with a 90-day jail term. After probation was revoked for a violation, he argued that the trial court should have sentenced him to probation under Proposition 36, as was required in light of his cocaine possession conviction. The Court of Appeal rejected that argument on the foregoing principle, noting that even though the defendant did not bargain for a specific sentence, he did receive the benefit of probation and dismissal of a charge that would have disqualified him from Proposition 36. The court went on to say that under the circumstances, his request to recast the agreement was an attempt to trifle with the court. The same type of trifling is at play in this instance. The court placed Riley on "informal probation" at the instigation of his counsel in his presence. It was obvious that the court in granting the request of defense counsel was not choosing a procedure which the court considered not

to be in the best interest of Riley full well knowing that Riley would fail in his treatment plan. The granting of that request cannot be placed in the category of the trial court merely waiting for Riley to shoot himself in the foot and then sentence him to prison when Riley violated the terms of his probation. Rather, the trial judge was extending to Riley the benefit of continued treatment at the Veteran's Administration in a program already underway and giving some optimism for Riley's eventual recovery from his affliction. This case is entirely different from the facts contained in *People v. Campbell* (2004) 119 Cal.App.4th 1279 wherein the court improperly bargained with the defendant over what type of treatment program the defendant would be sent to within the Proposition 36 scheme, which the court knew would not be in the defendant's best interest.

We are convinced that Riley appears to be playing "fast and loose" with the courts in this instance which we will not countenance. We find a clear case of estoppel as urged by the People.

Riley's last claim relates to his accusation that his counsel rendered ineffective assistance by failing to request non-Proposition 36 probation. In view of our holding that Riley is estopped from making such a claim, it follows that his counsel was not ineffective and we so hold.

CONCLUSION

In view of our conclusion that the court erroneously denied the *Pitchess* motion pertaining to Officer Arney, the matter must be remanded for an in camera hearing by the trial court. The trial court is first obligated by our reversal and remand to determine after reviewing the personnel files at issue whether they contain discoverable information that could lead to admissible evidence helpful to the defense. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 423; *People v. Johnson* (2004) 118 Cal.App.4th 292, 305.) Evidence is helpful or favorable to the defendant if it is "evidence that the defense could use either to impeach the state's witnesses or to exculpate the accused." (*People v. Ochoa* (1998) 19

Cal.4th 353, 473.) In remanding this case, we direct the court, in the event such evidence existed and should have been disclosed, to allow Riley an opportunity to demonstrate prejudice and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed.[3]

This standard for granting relief comports with the well-established function of the trial court in deciding a motion for a new trial under Penal Code section 1181. (See *People v. Serrato* (1973) 9 Cal.3d 753, 760-761, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1 ["[T]he power of a California trial court to hear and decide a motion for a new trial in a criminal case is strictly limited to the authority granted by Penal Code section 1181."].) The provision of section 1181 most applicable to this setting is subdivision 8, which authorizes a trial court to order a new trial when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." Diligence not being an issue here,[4] the principal factor for the trial court to consider under this subdivision is whether the evidence is "such as to render a different result probable on a retrial of the cause." (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).) In

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[3] The question whether a showing of prejudice is required at all under such circumstances was decided by the California Supreme Court in *People v. Gaines* (Apr. 30, 2009, S157008) ___ Cal.4th ___ [2009 WL 1151743]. In a unanimous opinion authored by Justice Marvin Baxter, our high court concluded as follows: "We conclude that the trial court's erroneous denial of a *Pitchess* motion is not reversible per se. Rather, the failure to disclose relevant information in confidential personnel files, like other discovery errors, is reversible only if there is a reasonable probability of a different result had the information been disclosed." (*Id*. at p. ____.)

[4] Ordinarily, "[i]n ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

making that evaluation, "'the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.'" (*Id.* at p. 329.)

Under *Delgado* the trial court's decision to deny a motion for a new trial based upon newly discovered evidence is reviewed for an abuse of discretion: "'The determination of a motion for a new trial [based on newly discovered evidence] rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'" (*Delgado, supra,* 5 Cal.4th at p. 328.) """[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background."""" (*Ibid.*)

DISPOSITION

The judgment is reversed and remanded for an in camera examination of the police personnel records of Officer Arney in accordance with the views expressed herein. If relevant information is found in Officer Arney's personnel records which should have been disclosed, then appellant is to be given an opportunity to prove with reasonable probability a different result would have occurred had the information been disclosed. Should the in camera inspection fail to produce any discoverable evidence helpful to the defense, then the judgment and sentence are to be reinstated.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**